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## DEFERENTIALISM: A POST-ORIGINALIST THEORY OF LEGAL INTERPRETATION

Scott Soames\*

In this paper, I present “Deferentialism,” a new conception of legal interpretation that has close affinities with originalism, while shedding much of its accumulated baggage. The new conception includes two dimensions of deference to original sources: one to a species of original meaning, and the other to a species of original intent. The dimensions are ordered. The first task is to identify the relevant original meaning; intent becomes constitutive, as opposed to merely evidential, only after that meaning has been identified.<sup>1</sup>

The first question in interpretation is: what does the law say, assert, or stipulate? Saying, asserting, and stipulating are *speech acts*—or, in more technical philosophical terminology, *illocutionary acts*—as are confirming, denying, ordering, and promising. Each of these involves taking a certain stance toward the content of the act. To *say* or *assert* something is to commit oneself to it being true, as is to *confirm* something in the special case in which it has been the subject of previous interest or inquiry. To *deny* something is to commit oneself to its being false. To *order* someone to do something is to direct that person to make it true that he or she does such-and-such, while to *promise* to do something is to commit oneself, often by asserting that one promises, to *making it true* that one does such-and-such. Stipulation is similar. For a proper authority to *stipulate* that, say, the speed limit on certain roads in New Jersey is sixty miles per hour is for the authority to assert that the speed limit is sixty miles per hour and for that very assertive act to be *a*, or *the*, crucial component in making what is asserted true.

To discover *what the law asserts or stipulates* is, in the first instance, to discover what the lawmakers asserted or stipulated in adopting an

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1. Deferentialism applies equally to statutory and constitutional interpretation. This is unlike Justice Scalia’s originalism, where what he calls lawmakers’ “intent” is relevant for constitutional, but not statutory, interpretation. What I mean by “intent” (to be explained below) is relevant to both. Elsewhere I explain why and how intent, in my sense, often plays a larger role in constitutional interpretation than it does in statutory interpretation. But the theoretical framework governing interpretation is the same in the two cases. See Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 244–59 (2011).

authoritative text. As with ordinary speech, this is usually *not* a function of the linguistic meaning alone; it is a function of meaning plus the background beliefs and presuppositions of participants. In general, what a speaker uses a sentence *S* to assert or stipulate in a given context is, to a fair approximation, what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker's use of *S* to be intended to convey and commit the speaker to. In most standard linguistic communications, all parties know, and know they all know, the linguistic meanings of the words and sentences used, plus the general purpose of the communication and all relevant facts about what previously has been asserted or agreed upon. Because of this, what is asserted or stipulated can usually be identified with what the speaker means and what the hearers take the speaker to mean by the words used on that occasion. Applying this lesson to legal interpretation, the deferentialist looks for *what the lawmakers meant and what any reasonable person who understood the linguistic meanings of their words, the publically available facts, the recent history in the lawmaking context, and the background of existing law into which the new provision is expected to fit, would take them to have meant*. This—not the original linguistic meaning of the words they used—is the content of the law as enacted.

The point is illustrated by two well-known examples from Justice Antonin Scalia's dissent in *Smith v. United States*.<sup>2</sup> The relevant legal text in the case is the following statute: "[A]ny person who . . . uses or carries a firearm [in the course of committing a crime of violence or drug trafficking], shall, in addition to the punishment provided for such [a] crime . . . be sentenced to a term of imprisonment of not less than five years . . ."<sup>3</sup>

The key fact in the case was that Smith traded a gun for illegal drugs, thereby committing a crime of drug trafficking.<sup>4</sup> The crucial question was whether this constituted *using a firearm* in the commission of such a crime in the sense of the statute.<sup>5</sup> After a lower court found that it did, Smith, wishing to avoid the extra five years in prison, appealed to the U.S. Supreme Court.<sup>6</sup> The majority upheld the lower court's ruling, finding that the ordinary meaning of the phrase "uses a firearm" covers uses of any sort, including trading a firearm for drugs.<sup>7</sup>

Justice Scalia's dissent, though wrongly formulated in terms of a restrictive and inaccurate thesis about *the ordinary meaning of the words in the statute*, nevertheless tracked what should have been the real issue—

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2. 508 U.S. 223, 241 (1993) (Scalia, J., dissenting).

3. 18 U.S.C. § 924(c)(1)(A) (2006).

4. See *Smith*, 508 U.S. at 225–27 (majority opinion).

5. See *id.* at 228. Oddly, the issue of *carrying a firearm* did not play a major role in the case. See generally *id.* at 223.

6. See *id.* at 227.

7. *Id.* at 230.

namely, what the lawmakers *asserted* in adopting the text.<sup>8</sup> Two of his examples forcefully drive the point home.

The first concerns the content of the question that an interrogative sentence is used to ask. Justice Scalia writes, “When someone asks, ‘Do you use a cane?,’ he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane.”<sup>9</sup>

The second concerns the content of an assertion made in response to a question in a hypothetical legal proceeding. Justice Scalia writes, “I think it perfectly obvious, for example, that the objective falsity requirement for a perjury conviction would not be satisfied if a witness answered ‘no’ to a prosecutor’s inquiry whether he had ever ‘used a firearm,’ even though he had once sold his grandfather’s Enfield rifle to a collector.”<sup>10</sup>

In both cases, Justice Scalia is right about the content of the speech act performed by speakers using the words in the situations imagined. The question that would standardly be asked by a use of the sentence, “Do you use a cane?” in an ordinary context (without special stage-setting) is: *Do you use a cane to walk?* The proposition asserted by saying “No, I have never used a firearm,” in response to the prosecutor’s inquiry is *that one has never used a firearm as a weapon*.<sup>11</sup>

But these correct observations about the contents of the agents’ illocutionary acts of questioning and asserting *do not* translate into similarly correct observations about the linguistic meanings of the sentences they used. The sentences “Do you use a cane?” and “I have never used a firearm” *do not* have the same meanings in the English language as the sentences “Do you use a cane *for walking*?” and “I have never used a firearm *as a weapon*.” To be sure, the former pair of sentences can, and in many contexts naturally would, be used *to ask the same question or make the same statement as* corresponding uses of the latter pair. But in other contexts, in which the background circumstances and presuppositions are different, the sentence “Do you use a cane?” can be used to ask whether you use a cane to prop open a window, or to protect yourself from wild dogs, while the sentence “I have never used a firearm” can be used to assert that one has never used a firearm in one’s comedy skit, or that one has never used a firearm for any purpose at all.

Since a sentence containing the phrase “use a firearm” can be employed to assert widely different contents in different contexts, its linguistic meaning cannot plausibly be identified with any of those contents. Rather, its meaning is a kind of schema that provides a common element to be filled out in different ways on different occasions. Since the content of a law enacted by adopting a text containing such a sentence must be a completed, truth-evaluable content, there is no real alternative in the *Smith* case to

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8. See *id.* at 241–43 (Scalia, J., dissenting).

9. *Id.* at 242.

10. *Id.* at 242 n.1.

11. See *id.*

identifying the legal content with *what Congress actually asserted* (as opposed to what it could have asserted using the same words had the arguments, debates, and legislative history been different). Had Justice Scalia been a deferentialist rather than an originalist, his central thesis would have been that in adopting the text, “[A]ny person who . . . uses or carries a firearm [in the course of committing a crime of violence or drug trafficking], shall, in addition to the punishment provided for such [a] crime . . . be sentenced to a term of imprisonment of not less than five years . . . ,”<sup>12</sup> Congress stipulated that the *use of a firearm as a weapon* (or carrying it for that purpose) is subject to additional punishment. This, I believe, is what both he and the Court would have concluded, had not he, and they, confused the *meaning* of that sentence with what it was used to *assert or stipulate*.<sup>13</sup>

My next illustration of the first task of deferentialist interpretation—discovering original asserted or stipulated content—is the Due Process Clause of the Fifth Amendment to the U.S. Constitution, copied and applied to the states in the Fourteenth Amendment. It reads, “No person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>14</sup>

The clause presents an interpretive problem. One can understand English perfectly well without knowing its content, and hence without knowing what rights it guarantees. This is *not* because the words “life,” “liberty,” or “property” have undergone substantial changes in ordinary meaning. They have not.<sup>15</sup> The main source of interpretive unclarity is the phrase “due process of law.” Even here, no individual word is unclear. Moreover, the phrase has a literal meaning—roughly *without the process to which, by law, one is due*. But one cannot rely on this meaning alone without rendering the guarantee vacuous, which neither it nor the rest of the Bill of Rights were. On the contrary, the Due Process Clause made an important contribution to the guarantees demanded by the people of thirteen newly independent states, who were nothing if not jealous of their rights and suspicious of any central authority that might transgress them.<sup>16</sup> The interpretive task is to discover the presupposed understanding of the process to which the people were widely believed to be entitled, that the language of the Fifth Amendment was used to express.

To discover the substance of this presupposed understanding of the framers and ratifiers of the Fifth Amendment, and later of the Fourteenth,

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12. 18 U.S.C. § 924(c)(1)(A) (2006).

13. See Stephen Neale, *On Location*, in *SITUATING SEMANTICS: ESSAYS ON THE PHILOSOPHY OF JOHN PERRY* 251 (Michael O’Rourke & Corey Washington eds., 2007); see also Soames, *supra* note 1, at 237–41.

14. U.S. CONST. amend. V; see also U.S. CONST. amend. XIV, § 1.

15. See, e.g., WILLIAM PERRY, *THE ROYAL STANDARD ENGLISH DICTIONARY* 575 (1st Am. ed. 1788) (defining life as “enjoyment or possession of terrestrial existence”); *id.* at 573 (defining liberty as “a power to do as one thinks fit; unless restrained by the law of the land” (emphasis omitted)); *id.* at 773 (defining property as the “right which one hath to lands or tenements, goods or chattels, which no way depend on another man’s curtesy”).

16. See generally Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 *YALE L.J.* 1672, 1721–26 (2012).

requires historical research. Much of this has been done by Nathan S. Chapman and Michael W. McConnell of the Stanford University Law School in their recent paper, *Due Process As Separation of Powers*.<sup>17</sup> The short version of their story begins in 1215 with a provision in Chapter 29 of the Magna Carta, stating, in effect, that the King may not deprive a subject of his rights under existing law without adjudication by an independent judicial body.<sup>18</sup> By 1354, this idea was expressed in a statute in which the application of existing law by a judicial body was summed up in the phrase “due process of law.”<sup>19</sup> In 1628, Parliament passed the Petition of Right, which stated that subjects could be deprived of rights only according to what is described variously as “the Law of the Land,” “due process[] of Law[],” or “by the lawful[] Judgment of his Peer[s].”<sup>20</sup> Chapman and McConnell sum up the lesson as follows:

Each of these phrases was a way of expressing the same two institutional checks on the King’s power to deprive persons of rights: only pursuant to positive law (common law or parliamentary statute) and only after judgment by a common law court. The “substantive” side of due process was positive, standing law; the “procedural” side was adjudication by a court. . . . When [Sir John Selden] Coke stated in a later commentary that Chapter 29’s “law of the land” was equivalent to the phrase “due process of law”—the commentary relied on by early Americans to equate the two constitutional guarantees—he was summarizing these two aspects of the rule of the common law . . . .<sup>21</sup>

From the end of the English Civil War through the late eighteenth century, Parliament gained power as the supreme arbiter of the law of the land.<sup>22</sup> By the 1770s, Parliament was not itself seen, except by a small number of Whig members of Parliament and their American supporters, to be lacking in power to deprive subjects of rights as it saw fit, without submitting to common law procedures.<sup>23</sup> However, there was a movement to restrict the procedures it employed when acting judicially.<sup>24</sup> This effort was taken further in the American colonies, where it was increasingly argued, including by the First Continental Congress, that Parliament itself had violated the law of the land—due process—in passing the Boston Port Act, the Massachusetts Act, and the Coercive Acts in 1774—these acts deprived colonists of jury trials in certain cases, and revoked other rights originally granted in the charter of the colony.<sup>25</sup>

In the 1780s, the constitutions of American states had established separation of executive, legislative, and judicial powers, and courts were declining to enforce legislative acts deemed to operate retrospectively, or to

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17. *Id.*

18. *Id.* at 1682.

19. *Id.*

20. *Id.* at 1687–88.

21. *Id.* (citation omitted).

22. *Id.* at 1692–93.

23. *Id.* at 1694.

24. *Id.* at 1693–94.

25. *Id.* at 1699–1701.

decide essentially judicial matters without benefit of trial.<sup>26</sup> In 1787, Alexander Hamilton argued that ex post facto laws against Loyalists violated “due process of law” in his *Remarks on an Act for Regulating Elections* made to New York State’s General Assembly.<sup>27</sup> His rebuke was not that the legislation violated fundamental rights, but that it usurped a properly judicial function, and so deprived persons of procedural rights that a judicial process guarantees.<sup>28</sup>

This was the understanding of “due process of law” shared by the Framers of the U.S. Constitution and Bill of Rights.<sup>29</sup> The guarantee that one would not be deprived of certain rights without due process was the guarantee that one would not be stripped of them without being charged with violating a constitutionally legitimate law in an independent judicial proceeding, with all the safeguards inherent in such a process.<sup>30</sup> The rights protected were not unrestricted, unenumerated rights, but specific rights having to do with life, liberty, and property.<sup>31</sup> The idea is illustrated by liberty, which was taken to be a natural right to act as one chooses *so long as it is not contrary to established law*.<sup>32</sup> The Constitution and Bill of Rights, along with state constitutions, restricted such law by putting certain activities, including exercise of freedom of speech, press, and religion, beyond its reach.<sup>33</sup> It was also understood that to pass muster, legislation must be general, rather than specific in application, and prospective rather than retrospective.<sup>34</sup> Other unmentioned aspects of natural liberty—like the right to travel, to work, to contract for goods and labor, to marry and raise a family, etc.—were taken for granted as instances of liberty that could not be deprived *without a proper judicial procedure*.<sup>35</sup> However, no restrictions were placed on the degree to which these natural rights could be regulated by legislation.<sup>36</sup> What the Fifth Amendment guaranteed was that one would not be deprived of any of these rights without a judicial proceeding pursuant to positive law.<sup>37</sup>

There was no significant change in this understanding when the Due Process Clause was included in the Fourteenth Amendment.<sup>38</sup> As Chapman and McConnell argue, antebellum state courts had used due process concerns, though not, of course, the Fifth Amendment, against legislative acts that abrogated procedural protections of common law, or deprived persons of liberty or vested property rights. But the grounds for these

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26. *Id.* at 1704–06.

27. *Id.* at 1714–15.

28. *Id.* at 1714–16.

29. *Id.* at 1715.

30. *Id.* at 1715–16.

31. *Id.* at 1780–81.

32. *Id.* at 1781.

33. *Id.* at 1736.

34. *See id.* at 1727, 1731–33.

35. *Id.* at 1680, 1735–36.

36. *Id.*

37. *Id.*

38. *Id.* at 1726.

decisions were that legislatures had performed essentially “judicial acts” that usurped the role of the courts, thereby violating separation of powers and due process.<sup>39</sup> The Supreme Court’s first major Due Process Clause decision came in 1855 in *Murray’s Lessee v. Hoboken Land & Improvement Co.*<sup>40</sup> At issue in this case was a law passed by Congress authorizing executive branch officers in the Treasury Department to seize private property as a means of recovering money owed without judicial warrant or jury trial.<sup>41</sup> In this case, they placed a lien on the property.<sup>42</sup> The Court ruled, in accordance with what was by then the traditional understanding of the separation of governmental powers, that due process required either the use of traditional common law judicial procedures or an alternative procedure providing the defendant with equivalent procedural guarantees.<sup>43</sup> In so ruling, the Court stated that the Due Process Clause restricted Congress’s ability “to make any process ‘due process of law’ by its mere will,” and identified the processes to be observed as those required by other constitutional provisions and by the “settled usages and modes of proceeding existing in the common and statu[t]e law of England, before the emigration of our ancestors”<sup>44</sup>—in effect, by the traditional procedures of common law.<sup>45</sup>

The history I have cited is merely a sample of the richer and more detailed account provided by Chapman and McConnell, who maintain that the original understanding of the Due Process Clause did not change when it was included in the Fourteenth Amendment and applied to the states.<sup>46</sup> Until the late nineteenth century, it was taken to state that: (1) no rights involving life, liberty, and property may be deprived without protection of a judicial process conforming to the separation of powers doctrine or to the traditional procedures of common law; (2) among those rights are those explicitly noted in the Constitution, which cannot be abrogated by the legislature; and (3) while other traditional rights can be modified by legislative acts, such acts must be distinguished from judicial acts as being general rather than specific in application, and forward looking rather than retrospective.<sup>47</sup>

This discussion illustrates the first dimension of Deferentialism—*identification* of legal content—by showing how it applies to an important and disputed constitutional provision. It also provides background for the second dimension of Deferentialism—*rectification*—which specifies the rationale for when and how judicial resolution of a case may, correctly, change the content of the law or laws being applied. Rectification begins

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39. *See id.* at 1726–27.

40. 59 U.S. (18 How.) 272 (1855).

41. *Id.* at 274.

42. *Id.*

43. *Id.* at 275–77.

44. *Id.* at 277.

45. *See* Chapman & McConnell, *supra* note 16, at 1774–75.

46. *See id.* at 1726.

47. *See id.* at 1680, 1735–36.



where identification leaves off. According to Deferentialism, the content of a legal provision can no more be identified with the meanings of the sentences in the text, or with the lawmakers' policy goals in adopting it, than the contents we assert in ordinary life can be identified with the linguistic meanings of the sentences we use, or with our conversational goals in using them. The contents of laws also cannot be identified with normative idealizations of what the lawmakers said or stipulated, including what they would have stipulated had they known relevant facts. Legal content is determined in essentially the same way that the asserted or stipulated contents of ordinary texts are, though it is important to note that: (1) since the paradigmatic aim of legal speech is authoritative stipulation, its natural counterparts include ordinary commands, firm requests, or action-guiding directions, rather than cooperative exchanges of information; and (2) legal stipulations must be understood in the context of complex systems of previous stipulations.

This naturalistic, non-normative conception of the contents of legal texts and performances leads, inevitably, to the process of rectification that no realistic theory of authoritative judicial action can afford to ignore. If the existing laws are what various legally authoritative actors have said or stipulated, then legal contents resulting from those assertions and stipulations can be just as vague and indeterminate, as conflicting and contradictory, and as ill-suited to furthering the goals for which the assertions or stipulations were made as the contents of ordinary texts and other linguistic performances. When ordinary speakers leave crucial contingencies unaddressed, when they unwittingly undertake inconsistent commitments, or when what they advocate transparently defeats the goals of their advocacy, we do not pretend that Beneficent Providence has filled every gap, removed every contradiction, and rationalized every linguistic performance.

The same is true in the law. When the assertive or stipulated contents adopted by legal actors are indeterminate, when they are contradictory or inconsistent with other legal provisions, or when they are self-defeating in particular applications, we should not pretend that Beneficent Providence has rescued the legislation by transubstantiating the lawmakers' flawed performance into a determinate, consistent, rationalized, and morally acceptable product. There is no such transcendental legal product. In these situations, existing legal contents are either indeterminate and thus provide no answers in adjudications that require one; inconsistent and thus provide conflicting answers; or self-defeating and thus provide only answers that subvert the publically expressed rationales offered in their support and for which they were adopted. In these circumstances, the task of the judge is *not* to discover an idealized law that is already there; *it is to make new law*. The challenge of Deferentialism is to articulate what form of deference to original, or at any rate antecedent, sources should guide this process.

The first type of rectification is *precisification*. This is what is needed when the asserted or stipulative content of a legal provision is vague, and facts crucial to the resolution of the case fall within the range of this

vagueness. In these circumstances, no determinate verdict is entailed by the facts plus the preexisting legal content. Deferentialism maintains that in such cases, the court's duty is to adopt the minimum principled precisification of the indeterminate existing content that allows a definite verdict to be reached that most closely conforms to the original lawmakers' rationale for adopting the legal provision.<sup>48</sup> By "rationale," I do not, of course, mean the causally efficacious motives that led them to act, which are often epistemically inscrutable and constitutively irrelevant. In addition to being private and difficult to discern, motives are as individual and various as the actors themselves. Attempts to aggregate them and identify the dominant motivators are at best speculative and at worst invitations to disguised judicial policymaking. A law's rationale consists not of the causally efficacious motives of lawmakers, but of the chief reasons publicly offered to justify and explain the law's adoption. This is what is worthy of deference, as well as being epistemically discernable in most cases.<sup>49</sup>

This is not to say that a law's rationale might not itself be vague. It often is.<sup>50</sup> But this will not affect its utility in resolving a case in which the facts place the case in the indeterminate range of the content of the law as enacted, unless those facts also happen to fall in the indeterminate range of the publically stated reasons for it. Often, this will not be so. And when it is, what then? Here, the legally authorized interpreter, often a court, must look at the contents of, and rationales for, the body of surrounding laws into which the original law fits. As before, the aim is to craft the minimum principled precisification of the indeterminate content of the original law that allows a definite verdict to be reached. What is new is that the precisification sought is the one that most closely conforms to a composite of the original rationales of potentially several laws, in addition to the one explicitly at issue in the case. Since the process is not algorithmic, it requires judgment, and so is open to abuse. But the point of a deferentialist conception of judicial action and authority is not to *prevent* abuse, which no reasonable conception can do. The point is to lay down justifiable principles for guiding and evaluating the inevitable exercise of judicial judgment.

The lawmakers' rationale for adopting a legal provision is also crucial for another kind of judicial rectification in which correct adjudication changes the law being applied. This sort of rectification involves *harmonizing* several equally authoritative laws that bear on the facts of a case in opposite ways, with the result that inconsistent verdicts are entailed by the contents

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48. See Scott Soames, *Vagueness and the Law*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 95, 99–107 (Andrei Marmor ed., 2012); Scott Soames, *What Vagueness and Inconsistency Tell Us About Interpretation*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 31, 42–44, 51–57 (Andrei Marmor & Scott Soames eds., 2011) [hereinafter Soames, *Vagueness and Inconsistency*].

49. For an illustration of this point, see Soames, *supra* note 1, at 250–51 (applying Deferentialism to the Patient Protection and Affordable Care Act); see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C.).

50. See Soames, *Vagueness and Inconsistency*, *supra* note 48, at 37.

of the laws plus the relevant facts. When this happens, the judge is required to fashion the minimal modification of existing laws that removes the inconsistency and allows a unique verdict to be reached, while maximizing the fulfillment of the discernable legislative rationales of the laws in question. Again, Deferentialism demands deference both to the original rationale of the legislation and to its original, though problematic, legal content—which is to be preserved to the maximum extent possible, consistent with eliminating inconsistency.

Harmonization also occurs when the facts of a particular case generate an inconsistency not between the contents of different statutes, but between the content of a single law and the transparent rationale for which it, or related laws, were adopted. In these cases, the law as it exists plus unanticipated facts of the case entail an unforeseen result that fails to conform to, and may even subvert, the purposes for which it was approved. In such cases, the deferentialist is again required to minimally modify the content of existing law, while maximizing the fulfillment of the discernable legislative rationale.<sup>51</sup>

Since judicial rectification legitimately makes law in all three of these types of situations, judges are themselves lawmakers. Thus, their assertive stipulations constitute new legal contents to be discerned by other judges in future cases. In addition, the stated rationales for their decisions provide grist for further processes of rectification when initial judicial stipulations are vague, when they conflict with other authoritative legal contents, or when literally applying them to subsequent, unanticipated facts subverts their original rationales.

With this in mind, I turn to some well-known “substantive due process” decisions that appear to be at variance with the original legal content of the clause they interpret. The questions at issue are: (1) whether the changes in the understanding of due process in these cases are justified by a deferentialist understanding of how correct interpretation can change legal content; and (2) whether, if they are not so justified, this casts doubt on the decisions, or on Deferentialism itself.

Pride of place in the string of well-known post-Fourteenth Amendment cases that changed the law of due process goes to *Lochner v. New York* in 1905.<sup>52</sup> In this case, the Supreme Court struck down a statute limiting the hours per day and days per week worked by bakers on the grounds that it deprived them and their employers of liberty without due process of law.<sup>53</sup> The liberty in question was freedom of contract.<sup>54</sup> According to the Court, “the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment.”<sup>55</sup> Although the Court recognized that states have the right to prohibit certain

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51. See Soames, *supra* note 1, at 244–59 (arguing that this special kind of legislation by harmonization plays a unique role in much constitutional interpretation).

52. *Lochner v. New York*, 198 U.S. 45 (1905).

53. *Id.* at 64.

54. *Id.* at 53.

55. *Id.*

kinds of contracts in the name of safety, health, morals, and general welfare, such prohibitions must pass certain tests. Which tests those were depended on which justice's opinion one read—ranging from the necessity of the prohibition to attain the desired end,<sup>56</sup> to its reasonableness,<sup>57</sup> to whether the contract right interfered with was what a “rational and fair man” would regard as a fundamental right.<sup>58</sup>

The reasoning behind, and substance of, this application of the Due Process Clause were new, and with the coming of the New Deal, were short lived.<sup>59</sup> How did the *Lochner* decision square with a deferentialist understanding of the clause? The fact that the decision changed the content of the constitutional provision does not itself condemn it, provided that the change was a proper instance of rectification, which it was not. Under Deferentialism, due process does restrict constitutionally permissible legislation, but not by enumerating substantive rights such as freedom of speech, of the press, of association, and of religion, enumerated elsewhere in the Bill of Rights. Unlike enumerated rights, the Due Process Clause, together with the general constitutional scheme defining the separation of powers, only requires that any legislation limiting unenumerated traditional rights be distinguished from judicial acts in being general rather than specific, and forward looking rather than retrospective, in application.<sup>60</sup> Since the right of freedom of contract required by *Lochner* is not enumerated in the Constitution, while the legislation struck down by the Court was, by its generality and prospectiveness, clearly *not* judicial in nature, the decision was clearly invalid by deferentialist standards, no matter what one may think of its merits or demerits as substantive social policy.<sup>61</sup>

Although *Lochner* is not popular today, it is possible to defend it using a kind of reasoning, which though significantly aprioristic, does have some contemporary currency. One begins by observing that the specific rights explicitly mentioned in the Constitution and Bill of Rights are fundamental rights. Next, one reasons that, surely, they are not the only fundamental rights. Since it is not plausible to suppose that the Founders thought otherwise, one continues by imagining that they wished—or by supposing that they *should rationally have wished*—that these other rights would also be constitutionally protected, while realizing that they themselves could not be expected to enumerate them all. Having gotten this far, one asks, “How might a rational Framers of the Constitution accomplish this?”—to which one answers “By inserting a vague, catch-all clause in the Bill of Rights to

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56. *Id.* at 68 (Harlan, J., dissenting).

57. *Id.* at 58 (majority opinion).

58. *Id.* at 76 (Holmes, J., dissenting).

59. *See generally* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (repudiating *Lochner*).

60. *See* Chapman & McConnell, *supra* note 16, at 1680, 1735–36.

61. For an interesting and well-reasoned defense of the Court's decision in *Lochner* against various nondeferentialist charges, see DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011).

cover the multiplicity of fundamental rights that future interpreters may discover.” This, the story goes, is the role played by the right to liberty—in the trio “life, liberty, and property” of the Due Process Clause.<sup>62</sup>

Of course, it is understood—and this part of the reasoning is historically accurate—that in saying that rights may not be deprived without due process of law, the Framers were saying two things: (1) that in order to deprive persons of their liberty (or other rights), those persons must be afforded the protections of a judicial proceeding in which the deprivation is judged to be in accordance with positive law; and (2) that the law itself must be legitimate.<sup>63</sup> The invention, in this *Lochnerian* defense, is its claim that in order for a law to be legitimate, it is *not* sufficient that the law not infringe any of the rights explicitly guaranteed in the Constitution and Bill of Rights, as well as being general rather than specific, and prospective rather than retrospective, in application. In addition, the law must not infringe any unenumerated fundamental right that the justices “discover.”<sup>64</sup>

To turn this into a defense of *Lochner*, one would have to claim that a virtually unfettered right of contract is a fundamental right, which few today are willing to do. But putting *Lochner* and the right of contract aside, this form of constitutional reasoning, in which the Due Process Clause serves as an all-purpose catchall for unenumerated rights, is quite general—as I will illustrate by discussing a lengthening line of more recent cases that exemplify it.<sup>65</sup> The point to be made here is that this form of reasoning is *not* deferentialist. To take it to be so, one would have to argue that the framers and ratifiers of the Fifth and Fourteenth Amendments *understood and announced* in the public rationale offered on behalf of the amendments that the Due Process Clause was an intentionally vague, *tabula rasa* on which future interpreters could write what they wished. Obviously, the framers and ratifiers did no such thing.

Nor would it have made sense for them to do so. The key to the Due Process Clause is *not* the enumeration of rights the deprivation of which require due process of law, but rather the specification of those processes of law that are sufficient to deprive persons of the rights in question.<sup>66</sup> Other provisions of the Bill of Rights enumerate rights that are not to be deprived or diminished by any legislative or executive action.<sup>67</sup> The function of the Due Process Clause is to provide judicial protection for deprivations of rights that *are* constitutionally proper subjects of legislative and executive action.<sup>68</sup>

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62. See U.S. CONST. amend. XIV, § 1. For an account of how the notion of “natural rights” informed legal interpretation of the Due Process Clause in the late nineteenth and early twentieth century, see BERNSTEIN, *supra* note 61, at 17–20.

63. See Chapman & McConnell, *supra* note 16, at 1735–36.

64. See *id.* at 1792–94.

65. See *infra* notes 69–98 and accompanying text.

66. See Chapman & McConnell, *supra* note 16, at 1735–36.

67. See *id.* at 1736.

68. See *id.*

The modern cases I will examine for their departure from Deferentialism are *Griswold v. Connecticut*,<sup>69</sup> *Roe v. Wade*,<sup>70</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>71</sup> and *Lawrence v. Texas*.<sup>72</sup> These cases mark the return of unenumerated, fundamental rights, buttressed in the end by an explicit appeal to due process.<sup>73</sup> This time, the rights in question were not public economic rights, which have long been politically subordinated to the vastly expanded power of federal and state governments. Instead, they are private rights having to do with personal sexual morality, the traditional restrictions on which, though not without expression in law, had their sources in religious and other private cultural institutions, rather than in the economy or the state.<sup>74</sup> This difference, which is by no means accidental, is interesting. Why should it matter, in the search for unenumerated fundamental rights, whether the rights concern public and economic behavior or matters of private, personal morality? Since Deferentialism recognizes no such significant difference, while the modern cases insist on one,<sup>75</sup> it is clear that these cases are not guided by any version of Deferentialism. It is, therefore, left to nondeferentialist defenders of these cases to explain why new, judicially “discovered,” fundamental rights should occur in one narrow range of human activity, but not in others. Here, I will concentrate less on which “rights” have found favor and more on the argumentative structure of the revival of *Lochner*-style constitutional reasoning.

*Griswold* was a vital precursor of the other cases discussed below, both in opening up a trove of supposedly fundamental rights not explicitly mentioned in the Constitution, and in taking economic rights off the table by declaring—with dubious relevance—that the Court would not “sit as a super-legislature to determine the wisdom, need, and propriety of laws *that touch economic problems, business affairs, or social conditions*.”<sup>76</sup> In this way, the Court endorsed the New Deal repudiation of *Lochner* while simultaneously reviving *Lochner*-style constitutional reasoning in a domain of human life in which it felt confident about the moral and political correctness of its super-legislative judgments.<sup>77</sup>

The linchpin of the case was the supposed discovery of a general right of privacy discernable from “penumbras, formed by emanations” of the First Amendment right of association, the Third Amendment right not to have soldiers quartered in one’s home, the Fourth Amendment right against unreasonable searches and seizures, and the Fifth Amendment right against self-incrimination.<sup>78</sup> The problem, of course, is that although these rights

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69. 381 U.S. 479 (1965).

70. 410 U.S. 113 (1973).

71. 505 U.S. 833 (1992).

72. 539 U.S. 558 (2003).

73. See, e.g., *Lawrence*, 539 U.S. at 564; *Casey*, 505 U.S. at 846–48.

74. See, e.g., *Lawrence*, 539 U.S. at 571.

75. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

76. See *id.* (emphasis added).

77. See also Chapman & McConnell, *supra* note 16, at 1797–98.

78. *Id.* at 484.

are genuinely guaranteed, there is no epistemically legitimate inference from which a general right to privacy encompassing matters of sexual morality such as contraception (which was at issue in *Griswold*) can be derived. On the contrary, Justice Douglas's "penumbras" and "emanations" were simply camouflage for a nondeferentialist doctrine that, in 1965, dare not speak its name.<sup>79</sup>

*Roe v. Wade*,<sup>80</sup> which followed *Griswold* in 1973, was braver than *Griswold*. As in the earlier case, the Court in *Roe* relied on a protected right of privacy.<sup>81</sup> However, unlike its reasoning in *Griswold*, the Court did not seek to derive the right of privacy from penumbras formed from emanations, or in any other way, including any appeal to long-standing tradition, as was attempted in the Harlan concurrence in *Griswold*<sup>82</sup> (which could not possibly have worked in *Roe*). Rather, it simply invoked *stare decisis* on the basis of the eight year-old decision that had struck down a law in one state that was not then being enforced anyway.<sup>83</sup> This "settled law" was the ground for vastly extending the right of privacy invented in *Griswold* to a much more problematic domain, thereby striking down the laws—some quite recent and many allowing abortion in certain circumstances—of all fifty states. In sum, the decision was reached by *Lochner*-style reasoning from the premise of *Griswold* privacy.

This time, the Court did not suggest, by irrelevant declaration, that it was not acting as a super-legislature. This new reticence was a step forward, since the tautological claim that in ruling on a noneconomic case the Court was not acting (improperly) as a super-legislature on economic matters did nothing to show that it was not, in fact, acting (improperly) as a super-legislature on other matters. If the Court had essentially nothing new to say about why its *Lochnerian* reasoning was acceptable, and the reasoning in *Lochner* was not acceptable, silence—throughout a great many pages—may have been the best policy. The effect of *Roe* was to deliver the nakedly nondeferentialist punch thrown by the nakedly nondeferentialist *Griswold*.

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79. Justice Harlan's concurrence offered a different rationale. See *id.* at 499–502 (Harlan, J., concurring); see also Chapman & McConnell, *supra* note 16, at 1796. Instead of attempting to derive a general right of privacy from Justice Douglas's enumerated rights, Justice Harlan judged the then moribund Connecticut statute prohibiting the sale of contraceptives to a married couple to violate a liberty—covered by the Due Process Clause of the Fourteenth Amendment—traditionally afforded to married couples. See *Griswold*, 381 U.S. at 500 (Harlan, J., concurring). Though this justification is certainly superior to Justice Douglas's, it still fails to pass deferentialist muster, since traditional common law liberty does not trump legislative enactments in a deferentialist understanding of due process.

80. 410 U.S. 113 (1973).

81. See *id.* at 152–53.

82. 381 U.S. at 499–502 (Harlan, J., concurring).

83. See *Roe*, 410 U.S. at 152–54. While *Roe* cites additional cases as sources of particularized privacy rights, *Griswold* is key to the Court's justification because it asserts a general right of privacy. See *Griswold*, 381 U.S. at 482–86. The Court implicitly invokes *stare decisis* by accepting as true that this line of cases, with *Griswold* at its center, establishes a "right of privacy," before determining that it "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 152–53.

The question in the next case, *Casey*,<sup>84</sup> was whether the state could, without violating a woman's right to an abortion under *Roe*, require her (in nonemergency cases) to (among other things) give her informed consent to the procedure, to wait twenty-four hours, and, if a minor, to obtain the consent of a parent (with the possibility of a judicial bypass).<sup>85</sup> The Court ruled five-to-four to uphold *Roe*, but accepted those of the state's restrictions that, neither in their purpose nor in their effect, placed an "undue burden" on or a "substantial obstacle" in the path of a woman seeking an abortion (which the Court ruled most, but not all, of the state's restrictions did not do).<sup>86</sup> Having put itself at the center of what, prior to *Roe*, had always been a legislative matter in the states, there was no way, short of repudiating *Roe*, of freeing the Court from having to make further legislative decisions about which details of new state legislation represented wise, or at least reasonable, trade-offs—here expressed in terms of the hopelessly vague distinction between burdens that are "undue" versus those that are not, and obstacles that are "substantial" versus those that are not.<sup>87</sup> Despite this vagueness, the message both to voters and to the states was clear: *nothing having to do with abortion is up to you anymore; you may do only what we in the future decide you may do*. With messages like these sent to a population raised to revere self-government, it is not hard to understand why the politics of abortion in the United States became so poisonous.

Beyond reaffirming *Roe*, the notably new element was the way in which the Court attempted to justify the decisions in this line of cases as legitimate *substantive* interpretations of the Due Process Clause of the Fourteenth Amendment.<sup>88</sup> Without repudiating the generalized right to privacy asserted in *Griswold* and *Roe*, the Court took "the controlling word in the cases before us" to be "liberty," thereby bringing the Due Process Clause directly into play.<sup>89</sup> Privacy was, in effect, subsumed under liberty as a special case, with the Court asserting that its "obligation is to define the liberty of all."<sup>90</sup> As for a definition, the nearest we get is the plurality's astounding assertion that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>91</sup> This is classic *Lochner*-style reasoning dressed up in contemporary pseudophilosophical form—with an utterly vague, subjective, and general conception of liberty serving as a placeholder into which the justices may insert whatever new fundamental rights they themselves discern, whether or not the supposed rights are derivable from explicit constitutional texts, embedded in tradition, or even enjoy a current national

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84. 505 U.S. 833 (1992) (plurality opinion).

85. *Id.* at 844.

86. *Id.* at 877.

87. *See id.*

88. *See id.* at 846.

89. *Id.*

90. *Id.* at 850.

91. *Id.* at 851.



consensus. In this way, the Due Process Clause was made into one of the Court's leading legislative enablers.

Anticipating objections to this judicial blank check, the Court in *Casey* conceded that "a literal reading" of the Due Process Clause might suggest that "it governs only the procedures by which a State may deprive persons of liberty."<sup>92</sup> But it quickly adds that this cannot be so because "for at least 105 years . . . the Clause has been understood to contain a substantive component as well."<sup>93</sup> Really? What do we find 105 years prior to *Casey*? The case cited by the Court is *Mugler v. Kansas*,<sup>94</sup> which initiated the economic substantive due process line of cases leading to *Lochner*.<sup>95</sup> So the doctrine that begins with *Griswold's* enthusiastic endorsement of the long-standing repudiation of economic due process cases like *Lochner*—and the Court's pious, but unsupported, suggestion that *Griswold* is to be sharply distinguished from them—is first extended in *Roe*, and later ratified and cast in due process terms in *Casey*. There, substantive due process is articulated, given full expression, and *defended* by appealing to the supposedly 105-year-old validity of the long-repudiated *Lochner* line. Whatever else this may be, it is not a coherent defense of the Court's nondeferentialist practice.

The final case in this line that I will mention is *Lawrence v. Texas*,<sup>96</sup> in which the Court invalidated a Texas statute against consensual homosexual sex.<sup>97</sup> The case is significant mainly as further entrenchment of the evolving substantive due process doctrine arising from *Griswold*, *Roe*, and *Casey*. As in *Roe* and *Casey*, the Court simply asserts its undefined and seemingly unlimited power to define for all the fundamental rights it wishes to put beyond the reach of democratic politics at any level of government.<sup>98</sup> If one thinks that the Supreme Court is, or should be, a super-legislature with the power to invalidate legislation in any manner it wishes, then one may plausibly defend its decision in *Lawrence* on the grounds that the result reached is not only good but would probably be supported by most citizens. However, if one thinks that the Court in our system of government is not, and should not be, a super-legislature, then one must judge its essentially legislative actions in *Griswold*, *Roe*, *Casey*, and *Lawrence* to have exceeded its legal authority, even though the policy results achieved were sometimes good. My own conclusions are (1) that *Lochner*, *Griswold*, *Roe*, *Casey*, and *Lawrence* cannot be given deferentialist justifications, and (2) that the Supreme Court has produced no other coherent justifications for them.

What kind of justification should we be looking for, not just for individual decisions, but for Deferentialism itself? The justification I am most concerned with is *descriptive*. When legal interpretation is understood

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92. *Id.* at 846.

93. *Id.* (citation omitted).

94. 123 U.S. 623 (1887).

95. See Chapman & McConnell, *supra* note 16, at 1798.

96. 539 U.S. 558 (2003).

97. *Id.* at 578.

98. See *id.* at 564.

as the application of law to the facts of particular cases by authorized legal actors, one expects the task to be governed by legal rules that determine the responsibilities of those charged with it. Although legal rules are normative, the claim that a particular set of such norms is taken by citizens and holders of public offices to be legally authoritative is descriptive. It is just such deeply and commonly accepted norms that, at bottom, constitute the authority of any system of laws. The descriptive questions to which I seek answers are: (1) What are the legal obligations of judges, justices, and others charged with applying the law to particular cases in the United States? (2) Does the deferentialist conception properly characterize them? (3) How do other conceptions of the legal obligations of those applying the law to particular cases compare with it?

My schematic answer to the first question is that courts are not to legislate, but are to apply laws adopted by the legislature to facts of particular cases. To do so, they must determine what the lawmakers stipulated in adopting the relevant texts and apply that content to the facts of the case. When this fails to determine a unique, acceptable legal outcome—either because the legal content leads to inconsistent outcomes, or because it fails to lead to any outcome, or because it leads to an unforeseen outcome that subverts the predominant legislative rationale of the lawmakers in adopting the relevant laws—the task of the judge is to fashion the minimal modification of existing legal content that removes the deficiency and allows a decision to be reached, while maximizing the fulfillment of that rationale. If this is roughly correct, then so is deferentialist legal interpretation. Is it correct? Surely, something approximating it has been the dominant understanding of the educated portion of the populace throughout most of the history of the United States. Though that consensus has diminished among the political elites in the last half century, adherence to this conception is, I think, still widespread.

There is, to be sure, a decades-old strain of nondeferentialist decisions in courts at all levels.<sup>99</sup> This could not be so were there not substantial opposition to Deferentialism among legal professionals, legal theorists, journalists, and politicians. But it is not obvious to what extent support for these decisions is result oriented, and to what extent it reflects genuine opposition to a deferentialist conception of the proper role of the judiciary. Consider a common form of argument: it begins with the claim that it is

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99. In addition to the cases discussed above, *supra* notes 69–98 and accompanying text, this nondeferentialist tendency can be seen in other lines of cases. One example is the “one man, one vote” cases. *See* *Avery v. Midland Cnty.*, 390 U.S. 474 (1968); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). Another example includes cases concerning separation of church and state. *See* *Lee v. Weisman*, 505 U.S. 577 (1992); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). A third example can be seen in some post-*Brown v. Board of Education* school desegregation cases. *See* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Jenkins v. Missouri*, 959 F. Supp. 1151 (W.D. Mo. 1997).

vitality urgent that the country address some issue. It is then claimed that political institutions have proven unable to accomplish what needs to be done because they are deadlocked. So, it is argued, courts must do the job by ruling a certain way, even though there is no deferentialist justification for so ruling.

It is important to notice that, in itself, this is *not* an argument against the descriptive claim that the legal responsibilities of judges are as Deferentialism defines them. They may be so defined, even if *sometimes* it is *morally better* for judges to do what they are not *legally* authorized to do. Although this may sound unfamiliar, it should not be shocking. It is not shocking because virtually any position, short of being an absolute ruler, carries with it limitations on one's authority. Because of this, circumstances can arise in which the morally best thing to do exceeds one's authority. This can happen with judges as much as with those in other positions. But if it does happen, a judge cannot very well admit it, since quite apart from the penalties the judge would face, a public admission of what amounts to illegally achieving a desired legal result, would, in many cases, invalidate, or at least undermine, that very result. Consequently, one cannot expect judges who are willing to violate their authority in order to achieve "a higher good," or commentators who wish to aid them, to speak forthrightly about what they are doing. This explains the unfamiliarity with what would otherwise be an obvious point. The mere fact that some morally or politically good results cannot be, or could not have been, achieved by deferentialist justices does not show that Deferentialism is an incorrect account of the legal responsibilities of those now, or in the past, charged with applying the law to the facts of particular cases.

The activist argument is not even a *normative* argument against Deferentialism—unless one can show that a *better* workable system is possible in which no constraints on what judges are *legally authorized* to do could ever prevent them from reaching a morally optimal result in a particular case. Absent such an unlikely showing, the argument that *sometimes* judges *should* arrive at nondeferentialist results fails to demonstrate that the deferentialist conception of the role of the judiciary is not *normatively* optimal, let alone that it is not descriptively correct.

To argue against Deferentialism, one needs to specify a competing conception of judicial responsibility. One such *antideferentialist* conception might naturally begin by admitting that lower courts—as well as the Executive and the Legislature—are legally required to follow higher court rulings in an essentially deferentialist manner. Of course, the Supreme Court would not be so restricted. Like the old British House of Lords, it might be granted the power to void any legislation bearing on cases brought before it.<sup>100</sup> Moreover, it might be maintained that when considering the law in a case, the Court is free to alter its content for whatever moral or political reasons it finds compelling, taking account of

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100. See GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* 71–72 (9th ed. 2009).

the need to maintain stability and consistency in the laws, and to render their application reasonably predictable.

The chief difference between this antideferentialist conception of the role of the judiciary and the deferentialist conception is that the former grants vast legislative authority to the Supreme Court that the latter denies. In this, I believe the deferentialist conception more closely approximates descriptive adequacy concerning accepted legal norms in the United States than does the alternative. My reasons are:

(1) Deferentialism better reflects the fundamental importance of the separation of powers in the history of the United States than anti-Deferentialism does.

(2) Although there have been many nondeferentialist decisions, they have not generally been accompanied by articulations of an antideferentialist conception of the role of the judiciary. Why, if the governing conception of that role is really antideferentialist, have courts not been forthright in stating their rationales? Judges and justices almost never say they are legislating their own political or moral views, but rather claim to derive their antideferentialist results from old, accepted, and authoritative principles.<sup>101</sup> In so doing, they implicitly acknowledge that the deferentialist conception they seek to undermine is the governing conception from which their authority derives.

(3) The very incoherence of the changing and conflicting justifications given by the Supreme Court in *Griswold*, *Roe*, and *Casey* is itself a reflection of justices who know their authority derives from a deferentialist ideal that they, as a body, do not share. That they do not share it *is* a blow to the authority of Deferentialism. But they do not, as a body, share any articulated competing view either. The authority of Deferentialism cannot be replaced until a compelling alternative is articulated and embraced by the most widely known and respected legal and political figures. This has not happened.

(4) The appointment of judges, their tenure, and their code of conduct reflect the nonpolitical nature of legal responsibilities of deferentialist judging, rather than the political character of antideferentialist “interpretation.” Federal judges are appointed, not elected;<sup>102</sup> during their appointment hearings, they are excused from answering questions on issues that might come before them in order to preserve their neutrality;<sup>103</sup> their code of conduct restricts political activities and requires recusal in various

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101. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

102. See U.S. CONST. art. II, § 2, cl. 2; *Judicial Nominations and Confirmations*, U.S. SENATE COMMITTEE ON JUDICIARY, <http://www.judiciary.senate.gov/nominations/judicial.cfm> (last visited Oct. 21, 2013).

103. See, e.g., *The Nomination of Judge Sandra Day O'Connor of Arizona To Serve As an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 57–58 (1981) (statement of Sandra Day O'Connor) (“I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court . . . . Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter.”).

circumstances.<sup>104</sup> All of this is consistent with a deferentialist conception of their judicial responsibilities; it does not make sense on an overtly political conception of them.

For these reasons, I take the deferentialist conception of the legal responsibilities governing judicial application of the law to particular cases to be more descriptively accurate than the antideferentialist conception. Given the problematic nakedness of the legislative authority granted to the Supreme Court by the antideferentialist view, I suspect that a hybrid view that is partially deferentialist and partially not would be a stronger competitor.

With this in mind, consider an alternative conception in which the Court can exercise its authority to alter the content of the law *only* in cases in which Deferentialism allows it to do so—when: (1) the antecedent legal content is vague concerning aspects of the case needed to reach a result, or (2) that content plus the facts of the case inconsistently leads to contradictory results, or (3) the literal application of that content would produce a result that subverts the original rationale for its adoption. However, when one of these conditions is met, the Court is *not*, according to the hybrid conception, restricted to making the minimum change to existing law that reaches a result that maximizes the fulfillment of the original rationale for the law in question. Rather, it can substitute its own moral and political judgment for those of the original lawmakers to produce a change in the law, provided that it articulates a reasoned argument that the change is an improvement that preserves aspects of the previous legal content not directly relevant to the case.

The deferentialist aspects of this view are its conception of legal content and its restrictions on when the Court is justified in rectifying that content (by modifying or replacing it). The nondeferentialist aspect of the view lies in the expanded legislative authority granted to the Court to change the law in the rectification process, with less respect paid to the content being replaced and minimal concern for the original legislative rationale for that content. As before, one can judge this conception of judicial responsibility either normatively or descriptively. The most obvious normative worry about the hybrid conception is that it gives unelected political actors with unlimited tenure too much authority to place matters beyond the reach of democratically elected representatives. In so doing, it also puts the genuinely judicial function of the Court at risk. By investing so much authority to *change the law* in the group that also decides *what the content of existing law is*, the hybrid approach risks losing the integrity needed to perform the latter, indispensable task. The knowledge, abilities, and motivating interests needed to correctly discern existing legal content in difficult cases are very different from those needed to promulgate wise and politically effective new laws. To authorize justices to perform both tasks

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104. *Code of Conduct for United States Judges*, U.S. Ct., <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> (last visited Oct. 21, 2013).

is to risk having the tasks performed by individuals who are not good at either, and perhaps not much interested in the genuinely judicial task.

Since I suspect these normative worries would be widely shared, I believe that the hybrid conception of judicial responsibility is *not* an accurate description of what the general populace plus the army of legal actors and public officials in the United States now take to be the authorized powers and responsibilities of the judiciary.<sup>105</sup> Nor would those who like the results of *Griswold*, *Roe*, *Casey*, and *Lawrence* find the hybrid position normatively acceptable, since it too would prevent those results from being reached by any of the means the Court actually employed. The problem for nondeferentialists of this stripe is that further departures from Deferentialism needed to vindicate those results would likely invite further defections from any suitably articulated principle of interpretation designed to reach them. So, although Deferentialism is threatened and the legal norms governing the judicial application of the law to particular cases in the United States are in flux, the challenge of replacing Deferentialism remains unmet.

That said, Deferentialism faces a challenge of its own. Because of the many anti- or nondeferentialist decisions in past decades,<sup>106</sup> any effective renewal of Deferentialism must include a strategy for dealing with the body of existing law created by those decisions. Since neither wholesale revocation nor wholesale preservation of previous nondeferentialist decisions in their current form is compatible with a lasting deferentialist judiciary, finding a workable middle way is the most daunting task of rectification that confronts Deferentialism. The way to think of this task is, I suggest, to treat it as a subcase of harmonization of conflicts in law, where (at least) one of the laws in conflict is judge made. When the Supreme Court finds that the facts of a new case create a conflict between some valid legal provision and the law produced by a previous decision that the Court now finds unjustified, the task of the Court is to remove the conflict by making the minimal changes needed to the conflicting laws while furthering, to the extent possible, the rationales for both. How this would, or should, work in particular cases is, of course, a large, open-ended question. But the principle of respecting both laws, despite their provenance, and aiming for limited adjustments—which may, over time, become cumulative—is, I think, the best general procedure.

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105. I suspect that for advocates of a “living Constitution,” this model remains too deferential, while for originalists, this model grants too much political autonomy.

106. See, e.g., *supra* notes 69–98 and accompanying text.